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September 28, 2001

BY FAX AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D. Robert Lohn
Regional Administrator
National Marine Fisheries Service
7600 Sandpoint Way, NE
Seattle, WA 98115

Re: Delisting Petition

Dear Mr. Lohn:

I write on behalf of the Columbia-Snake River Irrigators Association to petition, pursuant to 16 U.S.C. § 1533 and 50 C.F.R. § 424.14,¹ for the removal of several "species" of Pacific Northwest salmon from "threatened" or "endangered" status under the Endangered Species Act. The Irrigators also note that the Secretary is under a duty, pursuant to 16 U.S.C. § 1533(c), to "conduct, at least once every five years, a review of" all listed species to determine, among other things, "whether such species should be removed from the list".

With the largest salmon runs observed this year since dam counts began in 1938, the time is ripe for reconsidering application of the Endangered Species Act to Pacific salmon stocks, and the best scientific and commercial data that must be considered in connection with this delisting petition include substantial increases in the salmon runs identified below. See 50 C.F.R. § 424.11(d)(2).

This petition focuses upon the lawfulness of the listings under *Alsea Valley Alliance v. Evans*, No. 99-6265-HO (Sept. 10, 2001), and in particular the lawfulness of NMFS' treatment of hatchery fish. Judge Hogan's opinion establishes the following propositions of federal law:

- The National Marine Fisheries Service (NMFS) has determined "distinct population segments" (DPSs), the smallest units of fish and wildlife eligible for protection under the Act, through designation of "evolutionarily significant units" (ESUs). (Slip op. at 15.)

¹ Pursuant to 50 C.F.R. § 424.14(a), the undersigned states that he is an attorney for Columbia-Snake River Irrigators Association, 3030 W. Clearwater, Suite 205-A, Kennewick, WA 99336 (509-783-1623).

- NMFS may not protect DPSs smaller than the larger ESUs containing hatchery stocks, and may not include hatchery stocks within the ESUs, yet exclude them from the listings. (Slip op at 16-17.)
- NMFS may not redefine the ESUs to include only "natural"² stocks, omitting hatchery stocks, because hatchery and "natural" stocks are the same species and interbreed when mature, are not reproductively isolated in that they "share the same rivers, habitat and seasonal runs", because hatchery spawned salmon constitute very substantial portions of the ESUs, and because "NMFS considers progeny of hatchery fish that are born in the wild as 'naturally spawned'" and worthy of listing.³ The Irrigators note that the United States Court of Appeals for the Ninth Circuit has previously acknowledged the "impossibility" of distinguishing "natural" from hatchery stocks.⁴
- NMFS does retain the option of broadening listing protections under the Act to include all "natural" and hatchery stocks within an ESU, to the extent that the best scientific and commercial data support the "threatened" or "endangered" risk status of the ESU *as a whole*. The irrigators doubt that such a case can be made.⁵

These propositions, applied to the "species" discussed below, establish that their listings were and are contrary to law. See 50 C.F.R. § 424.11(d)(3).

Snake River Steelhead

In listing the Snake River Steelhead, NMFS declared:

"Hatchery populations considered part of this ESU include the Dworshak National Fish Hatchery (NFH) stock (Summer run); Imnaha River stock (Summer run); and Oxbow Hatchery stock (Summer Run). . . ." 62 Fed. Reg. 43,937, 43,946 (Aug. 18, 1997).

Many other hatcheries were not included in the ESU, though "the proportion of hatchery fish in the Snake River Basin is very high for the ESU as a whole (over 80 percent hatchery fish passing Lower Granite Dam)." *Id.* at 43,950.

² While Judge Hogan's opinion did not so hold, for most of the relevant "species", the very concept of "natural" stocks is itself arbitrary, capricious and contrary to law because salmon straying and hatchery operations have effectively eliminated any truly "natural" stocks.

³ Though Judge Hogan's observations on these factual points were directed to Oregon coastal coho salmon, as set forth below, the same observations apply to all the "species" subject to this petition.

⁴ *PNGC v. Brown*, 38 F.3d 1058, 1068 (9th Cir. 1994) ("it is impossible to enforce the [Endangered Species Act's prohibition against] trade and transport [of protected fish] . . .").

⁵ The Irrigators are informed that NMFS' own analyses of and methodologies for assessing extinction risk, when applied to ESUs as a whole, including hatchery stocks, show no appreciable risk of extinction for nearly all Pacific Northwest salmon ESUs.

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At the same time, however, NMFS defined the class of fish subject to protection as "threatened" as:

"Snake River Basin steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in streams in the Snake River Basin of southeast Washington, northeast Oregon, and Idaho." *Id.* at 43,953.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified. NMFS has also arbitrarily and capriciously excluded the Lyons Ferry, Pahsimeroi, East Fork Salmon and Wallowa hatchery stocks from both determinations.

Middle Columbia River Steelhead

In listing the Middle Columbia River Steelhead, NMFS declared:

"NMFS identified two hatchery stocks associated with the Middle Columbia River ESU. After reviewing the best available information regarding the relationship between the hatchery and natural populations in this ESU, NMFS concludes that both the Deschutes River (ODFW Stock 66) and Umatilla River (ODFW Stock 91) hatchery stocks should both be considered part of the ESU." 64 Fed. Reg. at 14,517, 14,522 (Mar. 25, 1999).

However, NMFS defined the class of fish protected as "threatened" to exclude these hatchery stocks:

"Middle Columbia River steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead in streams from above the Wind River, Washington, and the Hood River, Oregon (exclusive), upstream to, and including, the Yakima River, Washington. Excluded are steelhead from the Snake River Basin." *Id.* at 14,528.

As a matter of federal law, this listing is plainly unlawful because, among other things, NMFS has applied the Act's protections to less than the DPS/ESU it identified.

Upper Columbia River Steelhead

In listing the Upper Columbia River steelhead, NMFS declared: "Hatchery populations considered part of this ESU include the Wells Hatchery stock of steelhead (Summer run)." 62 Fed. Reg. 43,937, 43,946 (Aug. 18, 1997). Other hatchery stocks were not included, though NMFS found that the proportion of hatchery fish in the ESU was 65-80%, and that "substantial genetic mixing of populations within this ESU has occurred. *Id.* at 43,949.

NMFS listed as endangered:

"Upper Columbia River steelhead (*Oncorhynchus mykiss*),

including the Wells Hatchery stock and all naturally spawned populations of steelhead (and their progeny) in streams in the Columbia River Basin upstream from the Yakima River, Washington, to the United States—Canada Border.” *Id.* at 43,953.

While the ESU and listing determinations are coterminous in this case, NMFS has arbitrarily and capriciously excluded the Skamania hatchery stock, and has improperly exercised federal authority to force the phase-out of this stock. In addition, while NMFS did evaluate the Wells Hatchery stock as part of the ESU, it did so only for the limited purpose of assessing whether the Wells population would be useful for recovery, and made no attempt to evaluate the extinction risk for the ESU as a whole, including the Wells fish. The listing is also arbitrary and capricious for this reason.

SNAKE RIVER SPRING/SUMMER CHINOOK SALMON

In listing the Snake River Spring/Summer chinook salmon, NMFS determined:

“The ESU for Snake River spring/summer chinook salmon is defined as all natural population(s) of spring/summer chinook salmon in the mainstem Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, Salmon River and Clearwater River. The natural population consists of all fish that are progeny of naturally spawning fish.” 57 Fed. Reg. 14,653, 14,661 (April 22, 1992).

NMFS then listed the entire ESU, so defined, as “threatened”. *Id.* at 14,662-63.

However, NMFS also declared that while it was “now listing only the natural populations; however, it is important to address whether any existing hatchery population is similar enough to the natural population to be considered part of the ESU . . .”. *Id.* at 14,861. The West Coast Chinook Salmon Biological Review Team subsequently concluded that “Stocks used in most ESU 15 hatcheries were derived from mixtures of non-indigenous stocks, or from a mix of indigenous and non-indigenous stocks”. *West Coast Chinook Status Review* at 176 (Dec. 17, 1997).⁶ The discussions in this Status review and other NMFS documents provide no principled basis for NMFS’ exclusion of the Dworshak, Kooskia, Clearwater, Rapid River, and Lookingglass Hatcheries from the ESU definition and from listing protection, and the listing is thus arbitrary and capricious under the principles elucidated in Judge Hogan’s decision.

SNAKE RIVER FALL CHINOOK SALMON

In its 1991 “Status Review for Snake River Fall Chinook Salmon”, NMFS noted that as of 1990, “a high proportion of fish passing Lower Granite Dam and found on nearby

⁶ This document declares that “spring- and summer-run stocks currently in the Clearwater Basin are not part of this ESU”. *West Coast Status Review* at 177. The Irrigators have been unable to identify an amended listing decision re-defining the ESU to exclude these stocks, and such an exclusion would in any event be arbitrary and capricious.

spawning grounds were hatchery strays, and the lack of any positive information documenting the continued existence of "pure" wild fish". In its 1992 listing decision, NMFS noted that Lyons Ferry Hatchery was "a facility developed with the intent of conserving the genetic integrity of Snake River fall chinook salmon". 57 Fed. Reg. at 14,659.

The ESU determination was inadvertently omitted from the initial listing, and published by correction:

"The ESU for Snake River fall chinook salmon is defined as all natural population(s) of fall chinook salmon in the mainstem Snake River and any of the following subbasins: Tucannon River, Grande Ronde River, Imnaha River, Salmon River and Clearwater River. The natural population consists of all fish that are progeny of naturally spawning fish." 57 Fed. Reg. 23,458 (June 3, 1992).

NMFS had listed the entire ESU, so defined, as "threatened". 57 Fed. Reg. at 14,663.

However, NMFS also declared that while it was "now listing only the natural populations; however, it is important to address whether any existing hatchery population is similar enough to the natural population to be considered part of the ESU...". 57 Fed. Reg. at 14,861. The West Coast Chinook Salmon Biological Review Team subsequently concluded that "a significant proportion of the Snake River fall run is presently reared at Lyons Ferry Hatchery and limited information is available on naturally spawning fish". *West Coast Chinook Status Review* at 71 (Dec. 17, 1997). NMFS representatives have publicly announced that it considered Lyons Ferry hatchery fish to be part of the ESU, but the Irrigators have been unable to obtain formal documentation of this decision.

Because NMFS applies the Act's protections to less than the DPS/ESU it has identified (including the Lyons Ferry fish), the listing is unlawful; in the alternative, it is unlawful because NMFS has arbitrarily excluded Lyons Ferry fish from the listing protections.

Upper Columbia River Spring-Run Chinook Salmon

In listing the Upper Columbia River spring-run chinook salmon, NMFS declared:

"After reviewing the best available information regarding the relationship between hatchery and natural populations in this ESU, NMFS concludes that six hatchery stocks should be considered part of the ESU and the remaining four stocks no part of the ESU..." 64 Fed. Reg. 14,308, 14,316 (Mar. 24, 1999).

NMFS also acknowledged that "the spring-run salmon populations in this ESU were effectively homogenized during the implementation of the Grand Coulee Fish Management Program". *Id.* at 14,315.

In this case, NMFS included the six hatchery stocks in its "endangered listing", which defined the listed "species" as:

"Upper Columbia River spring-run chinook salmon (*Oncorhynchus tshawytscha*), including all naturally spawned populations of chinook salmon in Columbia River tributaries upstream of the Rock Island Dam and downstream of Chief Joseph Dam in Washington (excluding the Okanogan River), the Columbia River from a straight line connecting the west end of the Clatsop jetty (south jetty, Oregon side) and the west end of the Peacock jetty (north jetty, Washington side) upstream to Chief Joseph Dam in Washington, and the Chiwawa River (spring run), Methow River (spring run), Twisp River (spring run), Chewuch River (spring run), White River (spring run), and Nason Creek (spring run) hatchery stocks (and their progeny)." 64 Fed. Reg. at 14,329.

While the ESU and listing determinations are coterminous in this case, NMFS has arbitrarily and capriciously excluded the Winthrop, Entiat, Leavenworth and Ringold hatchery stocks, and has improperly exercised federal authority to force the phase-out of the stocks derived from the Carson hatchery stock and propagated at some of these hatcheries. In addition, while NMFS did evaluate the six hatchery stocks as part of the ESU, it did so only for the limited purpose of assessing whether these stocks would be useful for recovery, and made no attempt to evaluate the extinction risk for the ESU as a whole, including the six hatchery stocks. The listing is also arbitrary and capricious for this reason.

Snake River Sockeye Salmon

The Snake River sockeye salmon listing, which protects both "natural" sockeye and their hatchery progeny established through a captive broodstock program, was always an arbitrary and capricious exercise of federal listing authority, which was never intended to apply a species of great abundance threatened with extinction in a single lake on the geographical boundary of the species. Moreover, the administrative record of that listing decision and subsequent information gathered by NMFS contain ample scientific and commercial evidence to justify de-listing this salmon stock. Among other things, within the terms of Judge Hogan's ruling, NMFS is arbitrarily and capriciously distinguishing between two forms of *O. Nerka* located within Redfish Lake that are believed to interbreed.

Conclusion

The federal government has no lawful role in selecting hatchery stocks of salmon for propagation or extermination within the Pacific Northwest. That role is Constitutionally charged to the Region's states and Native American Tribes. Indeed, the federal government can and should withdraw entirely from attempting to control Columbia Basin salmon management through the Endangered Species Act, restoring that role to the Region's states, acting through their interstate compacts including the Northwest Power Planning Council. This delisting petition offers the vehicle for such a withdrawal.

The federal government has far more pressing business than micromanagement of salmon recovery in the Pacific Northwest, and its unlawful extensions of federal authority in

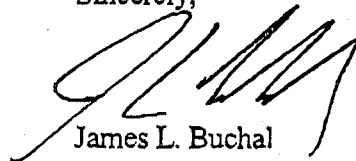
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these and other areas threaten to turn the federal government into a jack of all trades, but master of none. We ask that you serve our Nation's interests by faithfully executing the law and removing these species from the list, as part of a necessary effort to redirect federal resources upon issues of genuinely national concern.

This letter also constitutes notice, pursuant to 16 U.S.C. § 1540(g), of the Irrigator's intent to pursue any and all legal remedies available under the Act or otherwise to compel your faithful discharge of your duty to remove these "species" from the list. The Irrigators reserve the right to enter litigation to ensure appropriate and lawful actions on the part of NMFS.

Pursuant to 16 U.S.C. § 1533(b)(3)(A), you have ninety days to offer a substantive response to this petition for delisting.

Sincerely,



James L. Buchal

Copies by Certified Mail, Return Receipt Requested to:

Secretary of Commerce
Attorney General

Copies by Fax and First Class Mail to:

Governor Locke
Governor Kitzhaber
Governor Martz
Governor Kempthorne
Senator Murray
Senator Cantwell
Senator Smith
Senator Wyden
Senator Baucus
Senator Burns
Senator Craig
Senator Crapo
Congressman Hastings
Congressman Nethercutt
Larry Cassidy, Chair, Northwest Power Planning Council